No. 95-1569

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

CHRISTOPHER S. SIDWELL,

Petitioner,

v.

EXPRESS CONTAINER SERVICES, INC.

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. *The Petition for Writ of Certiorari does not exaggerate the conflict between the various federal circuits which have addressed the situs requirement under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901* et seq.

In its Brief in Opposition in this matter, Respondent, Express Container Services, Inc. ("Respondent"), acknowledges the clear conflict that the Fourth Circuit's decision creates with prior precedent from at least three distinct federal circuits, but suggests that that conflict is merely a minor conflict not worthy of redress by this Court. In so doing, Respondent suggests that Petitioner has overstated the conflict among the various other judicial circuits which have addressed the jurisdictional situs issue. In response, Petitioner again emphasizes that the various situs tests delineated by the Ninth, Fifth, and Second Circuits can all be classified generally as "functional" approaches to the situs inquiry under the Act. However, the Fourth Circuit's test is clearly distinct from those approaches. Simply put, as opposed to the Fourth Circuit's test, none of those "functional" approaches requires that the locus of the injury be physically contiguous with a navigable waterway. Further, merely categorizing these other decisions as taking a "functional" approach neither obviates the conclusion that a direct conflict exists among the functional approaches taken in those circuits and the restrictive approach taken in the immediate case nor minimizes the significance of that conflict. Simply put,

while in those three circuits the jurisdictional reach of the Longshore Act is not limited solely to areas which actually touch the navigable waters of the United States, application of the Act within the Fourth Circuit is strictly limited to such areas. Likewise, while in those cases separation from the waterway is not dispositive of the situs issue, the Fourth Circuit in the immediate case determined that, if the site where the injury occurs is separated from the water in any way, shape, or form, then even an admittedly maritime worker could not be covered by the Longshore Act.[1]

Further, even a cursory review of those cases reveals that the courts in question in those cases applied divergent tests and focused on different factors when analyzing the situs issue. For example, in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), the Ninth Circuit delineated four specific factors for application in evaluating whether a claimant's injuries fall within the situs coverage of the LHWCA. If the locus of the injury in that jurisdiction does not, at a minimum, satisfy those factors, then LHWCA coverage does not exist. In Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981), on the other hand, the Fifth Circuit adopted a

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[1] Note that, in its Brief in Opposition, Respondent "agreed" that the situs approach taken by the Third Circuit in Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976), was not a factor for consideration by this Court. Petitioner notes that, in his Petition, he explicitly relied upon that decision insofar as it illuminates (1) the disparity in interpretation and application of the situs requirement under the LHWCA and (2) the lack of and need for uniformity in that regard. With respect to the propriety or validity of that situs approach, Petitioner did not rely upon the decision and Respondent's "agreement" is proper.

"totality of the circumstances" approach that arguably extends well beyond the few factors set forth in Brady-Hamilton. Finally, in Triguero v. Consolidated Rail Corp., 932 F.2d 95 (2nd Cir. 1991), the Second Circuit cited both approaches with approval, suggesting a hybrid approach which focuses strongly on the Brady-Hamilton factors, while looking beyond those factors where warranted by the facts of the case before the court. If anything, these cases illustrate the fact that these various circuits, while applying similar approaches, do not apply the situs test under the Act in a uniform fashion. Instead, they take approaches under which varying factors may be dispositive of the situs inquiry. This despite the fact that such uniformity was explicitly envisioned by the drafters of the 1972 Amendments to the Act. Such a disparity in coverage and application of a federal Act designed to uniformly protect those engaged in maritime work is simply not insignificant.

II. *Respondent's Brief in Opposition mischaracterizes the fundamental distinction between the situs approach taken in this case and that taken in the various additional circuits which have addressed the issue.*

In its discussion of the conflict among the circuits with respect to the situs issue, Respondent posits that the test delineated by the Fourth Circuit in this case is in some way analogous to the "functional" approaches adopted and applied in the Fifth and Ninth circuits. In so doing, Respondent suggests that the restrictive test pronounced below examines both function and location and that both the Fifth and Ninth circuits examine these

factors in a comparable fashion. Respondent further intimates that the only real distinction between the approaches is that the Fourth Circuit's test creates a "clearer line" for defining situs coverage, and that such a line does not subject longshoremen in the Fourth Circuit "to an intolerably different scope of coverage" than longshoremen in those other circuits.

The statute in part defines the navigable waters of the U.S. to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area . . . ." 33 U.S.C. Section 903(a). When applying the "other adjoining area" language in that section, the section requires that the "area" be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." Id. In light of that language, it is clear that some nexus or functional relationship between the site of the injury and the navigable waterways of the U.S. is required. Thus, to the extent that the Fourth Circuit in this case retained that requirement, Petitioner has at no time taken exception to that determination. However, Employer is plainly wrong in suggesting that such a requirement in any way qualifies the court's restrictive interpretation of the term "adjoining" as utilized in the statute.

In the immediate case, the Fourth Circuit explicitly determined that the LHWCA does not, under any circumstances, cover areas which do not physically touch the navigable waters of the U.S., irrespective of the function for which that site is used. The court then went on to state that, once that initial hurdle is met, the site must still maintain an appropriate nexus with the navigable waters of the U.S. to be a covered situs under the Act. The existence of this second hurdle simply does not diminish the significance of the improperly created

initial hurdle. Clearly, in the Fourth Circuit, non-contiguous areas can never be covered under the Act. At the same time, such areas can in fact be covered situses in each of the additional circuits highlighted in the Petition filed by the injured worker. Thus, in light of this fundamental distinction, any argument that the various situs tests are somehow analogous is simply incorrect.

III. *The resolution of the conflict between the Fourth Circuit's decision in the immediate case and the additional circuits which have addressed the situs requirement is in no way irrelevant to the outcome of the immediate case*.

This case involves an injury suffered to Petitioner while engaged in maritime employment at a site regularly used by his employer to repair ship loading and unloading equipment, specifically containers and their chassis. That site does not physically touch the navigable waterways of the United States. However, due to expansion of the Portsmouth Marine Terminal in prior years and to the terminal's need for Respondent's terminal site, Respondent had relocated its facility to the off-terminal location where Petitioner was injured. Clearly, given the situs test delineated by the Fourth Circuit in the instant case, the off-terminal facility could under no circumstances constitute an "adjoining area," thereby negating any potential LHWCA coverage for that location. In contrast, under a "functional" approach such as those applied in the Ninth, Fifth, or Second Circuits, such a location could indeed constitute an adjoining area entitled to such coverage. For example, the site in question arguably meets the four situs factors delineated

by the Ninth Circuit in Brady-Hamilton: (1) the large bays and large storage area of the site where Respondent moved are especially conducive to container repair; (2) at least some of the adjoining areas are used for maritime purposes; (3) the site is located only eight tenths of a mile from the terminal, which physically touches the water; and (4) the location, at the time Respondent moved from the terminal, was the closest available site to the terminal. In addition, as highlighted in Petitioner's Petition, the Brady-Hamilton court specifically stated that a primary consideration in making the situs determination is the extent to which the choice of the site upon which the injury occurred was governed by considerations of maritime economy, as arguably occurred in the case at bar.

Likewise, under the totality of the circumstances approach adopted by the Fifth Circuit in Texports Stevedore Co., the site in question could be deemed a covered situs. The language of that case, while clearly requiring a nexus with the waterfront, directly states that physical contiguity and the presence or absence of non-maritime buildings between the site and the water or surrounding the site is not determinative of the situs inquiry. Rather, that court placed great weight on whether the site is located as near to the waterfront as feasible and whether the site's operations are part of the ongoing overall loading, shipping, shipbuilding, or ship repair processes. As indicated above, the facts of this case support such findings in favor of Petitioner.

The same holds true under the generalized functional approach taken by the Second Circuit in Triguero. Again, that court indicated that distance from a navigable waterway and separation from that waterway are not determinative of a situs inquiry. In light of that

approach, and in light of the reliance of that court on both Brady-Hamilton and Texports, a situs finding in favor of Petitioner under that approach is similarly supported on the facts at bar.

Accordingly, while the situs test pronounced by the Fourth Circuit in this case indisputably forecloses any potential recovery under the Act for Petitioner, it is clearly arguable that he could in fact fall within LHWCA coverage under a separate "functional" approach, a result which Petitioner submits is more in keeping with the letter and spirit of the Longshore Act.[2]

IV. *As opposed to Respondent's suggestion in its Brief in Opposition, the decision of the Fourth Circuit in this matter is not consistent with prior Fourth Circuit precedent on point.*

In its Brief in Opposition, Respondent asserts that the decision rendered in this case is not in contravention of prior precedent within the Fourth Circuit. In brief

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[2] Finally, note that this conclusion is appropriate irrespective of the dicta relied upon by Respondent. Respondent's argument in this regard first assumes as controlling the court's dicta even though the various additional situs tests discussed above were explicitly rejected by the court. Respondent's argument also assumes that those approaches themselves are, in the alternative to the approach taken in this case, the proper approaches for purposes of determining situs coverage under the LHWCA. That assumption ignores the possibility that a separate inquiry is appropriate under the Act or that certain additional factors could be determinative in a situs inquiry. The argument also demotes as trivial the significance of the legal error presented by this case. If in fact, as a matter of law, the situs standard applied in this case is improper, that error, in its own right, should be corrected by this Court.

response to that contention, Petitioner again points to the cases of Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), cert. denied, 485 U.S. 1028 (1988), and Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978). Each of those cases clearly applied a "functional" approach to the situs inquiry under the Act in which a location's proximity to the navigable waterways of the U.S. and separation of the site in question from such waterways, while factors for consideration, were not wholly dispositive of the situs issue.[3] Thus, in light of the court's holding in the immediate case that the locus of the injury must actually touch the navigable waterway and cannot be separated from the waterway in any way, shape, or form, the divergence between the cases is indisputable.

Admittedly, Humphries and Graham do not specifically set forth an explicit test to be applied in determining situs. However, in light of the factual contexts in which they arose, they clearly foreclosed a subsequent determination that the LHWCA's jurisdiction is limited to facilities which actually touch the navigable waters of the United States. Indeed, the court in Graham held that the situs test was satisfied with respect to a claimant who was injured at a foundry located approximately two and one-half blocks from the water's

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[3] In that regard, again note Judge Murnaghan's concurring opinion in Parker v. Director, OWCP, 75 F.3d 929 (4th Cir. February 9, 1996) (No. 94-2653). In that opinion, Judge Murnaghan cited Humphries for the proposition that a "situs 'need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation' for it to be within the LHWCA's scope." Parker, 75 F.3d at 938 (citing Humphries, 834 F.2d at 373).

edge and separated from the water by two public streets. It is simply undeniable that, under the test delineated in the immediate case, that injury would not have been covered.

Along the same lines, the injury at issue in Humphries occurred at a location even further removed from the water. While the area in question in that case was found not to constitute a covered situs, it is clear that whether that area touched the water and whether there was any separation of the site from the water, while considered, were not wholly determinative of situs coverage. Under the decision in the immediate case, however, it is likewise clear that whether the site touched the water would have been entirely dispositive of the situs issue in that case. Thus, when scrutinized, Respondent's argument that the current decision can be reconciled with prior Fourth Circuit decisions is wrong both generally and specifically.

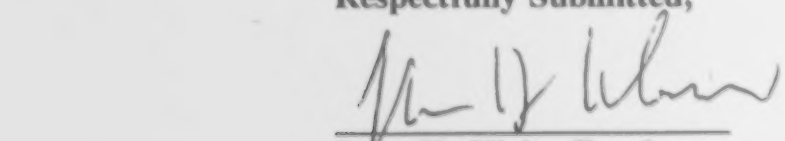
REQUEST FOR CONSOLIDATION

By and through this Reply to Respondent's Brief in Opposition, Petitioner, Christopher S. Sidwell, by counsel, hereby requests that this Honorable Court consolidate for purposes of certiorari review the Petition for Writ of Certiorari filed in this matter with the Petition for Writ of Certiorari filed on the 9th day of May, 1996 in the matter entitled Earl J. Parker, Jr. and Glenn C. Redmon v. Director, OWCP, et al., Record No. _____. In support of said request, Petitioner submits that the two Petitions address an identical issue under the same provision of a single statute, the Longshore and Harbor Workers' Compensation Act, 33

U.S.C. Section 901 et seq. Accordingly, consideration of the two Petitions collectively, as opposed to independently, would both facilitate the review process and would aide the Court in its decision as to whether or not to grant the Writs and address the issue presented.

WHEREFORE, Petitioner requests that this Honorable Court consolidate the Petitions filed in the two matters for purposes of certiorari consideration and any and all subsequent proceedings before the Court.

Respectfully Submitted,



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EXPRESS CONTAINER SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 903(a), provides compensation and benefits to employees engaged in maritime employment who suffer injuries "upon the navigable waters of the United States * * * including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used" by an employer carrying out specified longshoring activities. The question presented is whether a container-repair shop near, but not immediately contiguous to, a marine terminal, is located in an "adjoining area" within the meaning of Section 903(a).

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I-XXXIII) is reported at 71 F.3d 1134. The decision and order of the Benefits Review Board (Pet. App. XXXIV-L) are unreported. The decision and order of the administrative law judge (Pet. App. LI-LXIII) are reported at 26 B.R.B.S. (ALJ) 127 (1991).

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1995. A sua sponte suggestion of rehearing en banc was denied on January 29, 1996. Pet. App. LXIV-LXV. The petition for a writ of

certiorari was filed on March 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation for workplace injuries to persons who meet a "status" requirement, *i.e.*, satisfy the Act's definition of "employee," see 33 U.S.C. 902(3),[1] and have been injured at a maritime "situs." See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977). This case concerns the "situs" requirement, which appears in Section 3(a) of the Act and which specifies that the Act's coverage extends to

> injur[ies] occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

2. Petitioner Christopher Sidwell is a mechanic who repairs ship cargo containers. He suffered a disabling injury in June 1990 while working at a container repair facility owned and operated by his employer, respondent Express Container Services, Inc. Pet. App. III. Respondent is in the business of

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[1] Section 2(3) of the Act defines "employee," with certain exceptions not relevant here, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker." 33 U.S.C. 902(3).

repairing cargo containers and the chassis used to carry them. *Ibid.* Petitioner started work for respondent in 1978, when its shop was located just outside the gates of the Portsmouth Marine Terminal. *Id.* at III, LIV, LVI-LVII. Respondent relocated in 1985, when the Virginia Port Authority expanded the terminal and purchased respondent's facility. The new facility, at which petitioner was injured, is located 8/10 of a mile from the terminal gates. *Id.* at XXXVI, LVI. According to respondent's president, the new site was the available property closest to the terminal. *Id.* at LVI. The neighborhood between the terminal and respondent's repair shop is devoted to mixed uses (maritime as well as nonmaritime business and residential). *Id.* at IV, XXXVI, LVI-LVII.

Respondent contracts with shipping lines to repair cargo containers and chassis. Pet. App. III-IV, XXXVII, LV. Respondent performs repairs both shipside at the terminal and at its container repair facility. *Id.* at XXXVII, LIV. At the time of petitioner's injury, respondent employed mechanics who were regularly dispatched from the repair facility to conduct "shipside" or other repairs at the terminal; mechanics who performed "roadability" inspections and repairs as containers left the terminal; a driver who hauled containers between the terminal and respondent's repair facility; and mechanics who, like petitioner, primarily carried out repairs at the repair facility. C.A. App. 19, 21-22, 29, 47-48.

3. When petitioner sought benefits under the LHWCA, respondent denied coverage, arguing that petitioner did not meet the Act's status requirement, 33 U.S.C. 902(3), and that respondent's repair shop is not a covered situs under Section 3(a), 33 U.S.C.

903(a). After a hearing, an administrative law judge (ALJ) ruled that petitioner was engaged in maritime employment, and thus satisfied the status requirement, because the work that petitioner performed—maintenance and repair of cargo containers—is essential to the continued use of containers in longshoring operations. Pet. App. LVIII-LIX. The ALJ concluded, however, that the location at which petitioner was injured fell outside the coverage of Section 903(a). Employing a four-factor test articulated by the Ninth Circuit in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (1978) (Kennedy, J.), the ALJ held that respondent's place of business lacks a "functional relationship" with navigable waters, and thus is not a covered situs. Pet. App. LX-LXII. The ALJ therefore denied the claim for benefits. *Id.* at LXIII.

4. The Benefits Review Board affirmed, ruling that the ALJ had properly applied a "functional relationship" test and that his conclusions were supported by substantial evidence. Pet. App. XXXIV-XLVIII. In the Board's view, the ALJ had reasonably concluded that respondent's business did not require a site particularly well suited for maritime purposes and that the site had been chosen for economic, not geographic reasons. *Id.* at XLIV-XLV. The Board also attached little significance to petitioner's assertion that respondent dispatches workers from the site to perform shipside repairs, since petitioner himself worked only at the container-repair shop and was injured there. *Id.* at XLVI.

5. The court of appeals affirmed. Pet. App. I-XXXIII.[2] The court held that the "adjoining area" to which Section 903(a) refers must be "'contiguous with' or otherwise 'touch[]' [navigable] waters. If there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." Pet. App. XVII-XVIII (footnote omitted). The court acknowledged that "dictionaries do include 'neighboring' and 'in the vicinity of' as possible definitions of 'adjoining,'" *id.* at XVI, but stated that "such is not the ordinary meaning of the word," *id.* at XVII.

The court also rejected the contention that "the word 'area' is sufficiently broad that the phrase 'adjoining area' still covers the site where [petitioner's] injury occurred." Pet. App. XVIII. In the court's view, the phrase "other adjoining area" is properly construed by reference to the specific areas —"any adjoining pier, wharf, dry dock, terminal, building way, [or] marine railway," 33 U.S.C. 903(a) —

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[2] Although the clerk of the court of appeals had initially denominated the Director, Office of Workers' Compensation Programs, as a respondent in that court, the court of appeals ruled that the Director was not a proper respondent because he was not a real party in interest. Pet. App. V n.1 (citing *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995), and *I.T.O. Corp.* v. *Benefits Review Bd.*, 542 F.2d 903 (4th Cir. 1976) (en banc), vacated and remanded on other grounds, 433 U.S. 904, reinstated in pertinent part, 563 F.2d 646 (1977) (en banc) (per curiam)). The court, however, granted the Director's motion to intervene under Fed. R. Civ. P. 24(b); the Director had sought such intervention in the event he was denied respondent status. Pet. App. V n.1. The Director is therefore a respondent in this Court. See Sup. Ct. R. 12.4.